IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
On-Brief May 25, 2007

MBNA AMERICA, N.A. v. MICHAEL J. DAROCHA

A Direct Appeal from the circuit Court for Johnson County
No. 2772 The Honorable Jean A. Stanley, Judge

No. E2006-02000-COA-R3-CV - FILED AUGUST 15, 2007

This case arises from the grant of summary judgment in favor of Appellee/Bank on an award made by an arbitrator. Defendant/Appellant defaulted on his credit card payments and Bank instigated arbitration proceedings against Appellant pursuant to the Bank's standard credit card agreement. The arbitrator found in favor of Bank. Bank filed a motion for summary judgment in the Circuit Court at Johnson County, Tennessee seeking a judgment on the arbitrator's award. Finding no dispute of material fact and, under the authority outlined in the Uniform Arbitration Act, T.C.A. § 29-5-301 et seq., the trial court granted summary judgment in favor of Bank. Appellant appeals. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Michael J. Darocha, Pro Se

Ron E. Cunningham of Knoxville, Tennessee for Appellee, MBNA America, N.A.

OPINION

Michael Darocha ("Defendant," or "Appellant") obtained a credit card from MBNA America Bank, N.A. (the "Bank," "Plaintiff," or "Appellee"). The terms of use were outlined in the standard credit card agreement issued by the Bank, along with the amendments thereto (together, the "Agreement"). By using the credit card, Mr. Darocha became bound by the terms of the Agreement. The "Arbitration and Litigation" Section of the Agreement reads as follows:

> This Arbitration and Litigation provision applies to you, unless you were given the opportunity to reject the Arbitration and Litigation provisions and you did so reject them, in the manner

and timeframe required. If you did reject effectively such a provision, you agreed that any litigation brought by you against us regarding this account or this Agreement shall be brought in a court located in the State of Delaware.

Any claim or dispute ("Claim") by either you or us against the other, or against the employees, agents, or assigns of the other, arising from or relating in any way to this Agreement or any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether for money damages, penalties, or declaratory or equitable relief), including Claims regarding the applicability of this Arbitration and Litigation section or the validity of the entire Agreement or any prior Agreement, shall be resolved by binding arbitration.

The arbitration shall be conducted by the National Arbitration Forum ("NAF"), under the Code of Procedure in effect at the time the Claim is filed. Rules and forms of the National Arbitration Forum may be obtained and Claims may be filed at any National Arbitration Forum office, www.arb-forum.com, or P.O. Box 50191, Minneapolis, Minnesota 55405, telephone 1-800-474-2371. If the NAF is unable or unwilling to act as arbitrator, we may substitute another nationally recognized, independent arbitration organization that uses a similar code of procedure. At your written request, we will advance any arbitration filing fee, administrative and hearing fees which you are required to pay to pursue a Claim in arbitration. The arbitrator will decide who will be ultimately responsible for paying those fees. In no event will you be required to reimburse us for any arbitration filing, administrative or hearing fees in an amount greater than what your court costs would have been if the Claim had been resolved in a state court with jurisdiction. Any arbitration hearing at which you appear will take place within the federal judicial district that includes your billing address at the time the Claim is filed. This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"). Judgment upon any arbitration award may be entered in any court having jurisdiction. The arbitrator shall follow existing substantive law to the extent consistent with the FAA and applicable statutes of limitations and shall honor any claims or privilege recognized by law. If any party requests, the arbitrator shall write an opinion containing the reasons for the award.

> No Claim submitted to arbitration is heard by a jury, and no Claim may be brought as a class action or as a private attorney general. You do not have the right to act as a class representative or participate as a member of a class of claimants with respect to any Claim. This Arbitration and Litigation section applies to all Claims now in existence or that may arise in the future.
>
> This Arbitration and Litigation section shall survive the termination of your account with us as well as any voluntary payment of the debt in full by you, any bankruptcy by you, or sale of the debt by us.
>
> For purposes of this Arbitration and Litigation section, "we" and "us" means MBNA America Bank, N.A., its parent, subsidiaries, affiliates, licensees, predecessors, successors, assigns, any purchaser of your account, and all of their officers, directors, employees, agents, and assigns or any and all of them. Additionally, "we" or "us" shall mean any third party providing benefits, services, or products in connection with the account (including but not limited to credit bureaus, merchants that accept any credit device issued under the account, rewards or enrollment services, credit insurance companies, debt collectors, and all of their officers, directors, employees and agents) if, and only if, such a third party is named by you as a codefendant in any Claim you assert against us.
>
> If any part of this Arbitration and Litigation section is found to be invalid or unenforceable under any law or statute consistent with the FAA, the remainder of this Arbitration and Litigation section shall be enforceable without regard to such invalidity or unenforceability.
>
> THE RESULT OF THIS ARBITRATION AGREEMENT IS THAT, EXCEPT AS PROVIDED ABOVE, CLAIMS CANNOT BE LITIGATED IN COURT, INCLUDING SOME CLAIMS THAT COULD HAVE BEEN TRIED BEFORE A JURY, AS CLASS ACTIONS, OR AS PRIVATE ATTORNEY GENERAL ACTIONS.

The Agreement further provides:

> *If you do not wish your account to be subject to this Arbitration Section, you must write to us at MBNA America, P.O. Box 15565, Wilmington, DE 19850. Clearly print or type your name and credit card account number and state that you reject this Arbitration*

> *Section. You must give notice in writing; it is not sufficient to telephone us. Send this notice only to the address in this paragraph; do not sent it with a payment.* ***We must receive your letter at the above address by January 25, 2000 or your rejection of the Arbitration Section will not be effective.***

(Emphasis in original).

It is undisputed in the record that Mr. Darocha did not send written notice, by the January 25, 2000 deadline, of his desire to not be bound by the Arbitration section of the Agreement.[1]

Mr. Darocha ultimately defaulted on his account and, pursuant to the "Arbitration and Litigation" Section of the Agreement, *supra*, the Bank initiated an arbitration proceeding against Mr. Darocha with the National Arbitration Forum ("NAF"). A "Notice of Arbitration" form was sent to Mr. Darocha, which form outlines his options concerning the arbitration and specifically states that "[i]f you do not serve the Claimant and file with the forum written response, an award may be entered against you. An arbitration award may be enforced in court as a civil judgment." From the record, it appears that Mr. Darocha did not communicate with the NAF, nor did he submit any evidence or information to defend against the proceedings.

On or about February 12, 2004, the NAF issued an Award in favor of the Bank in the amount of $6,106.57. The NAF specifically found that:

> 1. That no conflict of interest exists.
> 2. That on or before 11/21/2003 the Parties entered into an agreement providing that this matter shall be resolved through binding arbitration in accordance with the Forum Code of Procedure.
> 3. That the Claimant has filed a claim with the Forum and served it on the Respondent in accordance with Rule 6.
> 4. That the matter has proceeded in accord with the applicable Forum Code of Procedure.
> 5. The Parties have had the opportunity to present all evidence and information to the Arbitrator.
> 6. That the Arbitrator has reviewed all evidence and information submitted in this case.
> 7. That the information and evidence submitted supports the issuance of an Award as stated.

On or about February 12, 2004, the Bank mailed a copy of the NAF award to Mr. Darocha.

---

[1] On or about June 24, 2003, Mr. Darocha sent a "Notice of Rejection of Arbitration; Reservation of Right" to the Bank. Although Mr. Darocha states that he rejects "any and all arbitration provisions...," it is undisputed that he sent no such notice on or before the January 25, 2000 deadline set out in the Agreement.

The Uniform Arbitration Act ("UAA"), T.C.A. § 29-5-301 et seq., provides, in relevant part, that:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract....

T.C.A. § 29-5-302(a) (2000).

T.C.A. § 29-5-313 (2000) outlines the procedure for seeking to vacate an arbitration award and reads, in relevant part, as follows:

> (a) Upon application of a party, the court shall vacate an award where:
> (1) The award was procured by corruption, fraud or other undue means;
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
> (3) The arbitrators exceeded their powers;
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 29-5- 306, as to prejudice substantially the rights of a party; or
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 29-5-303 and the party did not participate in the arbitration hearing without raising the objection.
>
> The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.
>
> (b) An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known.

T.C.A. § 25-5-313.

T.C.A. § 25-5-312 states:

> Upon application of a party, ***the court shall confirm an award, unless, within the time limits hereinafter imposed***, grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 29-5-313 and 29-5-314.

Id. (Emphasis added).

On April 18, 2006, the Bank filed a Motion for Summary Judgment in the Circuit Court at Johnson County, Tennessee. Based, *inter alia*, upon Mr. Darocha's failure to contest the Arbitrator's award within the ninety (90) days provided under the statute, the Bank sought a judgment on the Arbitrator's award. On April 25, 2006, Mr. Darocha filed "Defendant's Response to Plaintiff's Motion for Summary Judgment, Acceptance for Value of Judgment, and Tender of Birth Record as Accord and Satisfaction of Judgment." The matter was heard by the court, sitting without a jury, on August 7, 2006. On August 17, 2006, the trial court entered an "Order Granting Plaintiff's Motion for Summary Judgment." Based upon its finding that there were no genuine issues as to any material facts and that the Bank was entitled to judgment as a matter of law, the trial court confirmed the arbitration award in the amount of $6,096.57 with continuing interest at a rate of 10% from the date of the judgment.

On September 5, 2006, Mr. Darocha filed a "Motion for Relief from Clerical Mistakes in Judgment Dated August 17, 2006." The motion was denied by the trial court's Order of September 11, 2006. Mr. Darocha appeals and raises one issue for review as stated in his brief:

> Whether the Circuit Court erred in granting the plaintiff-appellee's Motion for Summary Judgment and concluding, as a matter of law, that no genuine issues of material fact exist in the action between the defendant-appellant and the plaintiff-appellee.

Before turning to the issue before us, we first address a technical matter concerning the Notice of Appeal filed by Mr. Darocha, which Notice reads, in pertinent part, as follows:

> Notice is hereby given that MICHAEL J. DAROCHA, Defendant above named, hereby Appeals to The Court of Appeals of Tennessee from the final judgment entered in this action on the 17th day of August, 2006.
>
> /S/ MICHAEL J. DAROCHA©™ By Michael James Darocha Authorized Agent UCC 3-402(b)(1)

In ***Bank of America, N.A. v. Michael J. Darocha***, No. E2007-00063-COA-R3-CV, 2007 WL 1515007 (Tenn. Ct. App. May 24, 2007), this Court dismissed Mr. Darocha's appeal from a default judgment entered against him in the trial court. This Court specifically found that "Michael J. Darocha" and "MICHAEL J. DAROCHA" are separate entities and dismissed the appeal, to wit:

> These findings clearly constitute a determination by the trial court that "Michael J. Darocha" and "MICHAEL J. DAROCHA" are separate entities. Furthermore, as we have previously noted, in its assessment of costs, the trial court specifically identified the defendant in this case as "Michael J. Darocha," not "MICHAEL J. DAROCHA." However, although the final judgment in this case was against "Michael J. Darocha," the notice of appeal was not filed on behalf of "Michael J. Darocha," but rather, on behalf of "MICHAEL J. DAROCHA©™." Notwithstanding any questions regarding the validity of pleadings filed in this case by non-attorney Michael J. Darocha on behalf of the entity MICHAEL J. DAROCHA©™, it is our conclusion that the latter entity had no right to appeal the trial court's judgment. We reach this conclusion based upon the fact that the judgment appealed from was not rendered against "MICHAEL J. DAROCHA©™," nor is there any proof that "MICHAEL J. DAROCHA©™" was adversely affect by such judgment. One has no right to appeal a judgment by which one is not adversely affected. ***Chaille v. Warren***, 699 S.W.2d 801, 804 (Tenn.Ct.App.1985). Accordingly, we must conclude that this appeal is not properly before this Court and is without merit.

Similarly, in the case now before us, the judgment is against "Michael J. Darocha" and the Notice of Appeal is filed on behalf of "MICHAEL J. DAROCHA." However, as set out in the body of the Notice of Appeal, *supra*, the "MICHAEL J. DAROCHA" on whose behalf the appeal is filed is not followed by the either the © symbol, or the ™ symbol. Because it is common practice to capitalize the names of parties in court filings, this Court cannot definitively conclude that "MICHAEL J. DAROCHA" is not "Michael J. Darocha." Consequently, we will allow the appeal to proceed and now turn to the issue before us.

It is well settled that a motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. ***See*** Tenn. R. Civ. P. 56.04. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***See Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn.1997). On a motion for summary judgment, the court must take the strongest legitimate view of evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. ***See id.*** In ***Byrd v. Hall***, 847 S.W.2d 208 (Tenn.1993), our Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery material, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth specific facts showing that there is a genuine issue of material fact for trial.

Id. at 211 (citations omitted).

Summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion. ***See Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995). Because only questions of law are involved, there is no presumption of correctness regarding a trail court's grant or denial of summary judgment. ***See Bain***, 926 S.W.2d at 622. Therefore, our review of the trial court's grant of summary judgment is *de novo* on the record before this Court. ***See Warren v. Estate of Kirk***, 954 S.W.2d 722, 723 (Tenn.1997).

It is well settled that the language used in a contract must be taken and understood in its plain, ordinary, and popular sense. ***Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.***, 521 S.W.2d 578 (Tenn.1975). In construing contracts, the words expressing the parties' intentions should be given the usual, natural, and ordinary meaning. ***Ballard v. North American Life & Casualty Co.***, 667 S.W.2d 79 (Tenn.Ct.App.1983). If the language of a written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties. ***Sutton v. First Nat'l Bank***, 620 S.W.2d 526 (Tenn.Ct.App.1981). A contract is not ambiguous merely because the parties have different interpretations of the contract's various provisions, ***Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc***., 884 S.W.2d at 462 (citing ***Oman Constr. Co. v. Tennessee Valley Authority***, 486 F.Supp. 375, 382 (M.D.Tenn.1979)), nor can this Court create an ambiguity where none exists in the contract. ***Cookeville P.C.***, 884 S.W.2d at 462 (citing ***Edwards v. Travelers Indem. Co.***, 201 Tenn. 435, 300 S.W.2d 615, 617-18 (1957)). The interpretation of a written contract is a matter of law and not of fact. ***See Rainey v. Stansell***, 836 S.W.2d 117 (Tenn.Ct.App.1992). Consequently, construction of the contract is particularly suited to disposition by summary judgment. ***Browder v. Logistics Management, Inc.***, 1996 WL 181435, 1996 LEXIS Tenn.App. 227 (Tenn.Ct.App.1996); ***see also Rainey***, at 119.

In the instant case, the "Arbitration and Litigation" section of Agreement, as set out *supra*, is clear and unambiguous. Unless a credit card holder provides written notice of his or her desire to not be bound by the "Arbitration and Litigation" section of the Agreement, he or she is bound by same. It is undisputed in the record that Mr. Darocha did not provide written notice to the Bank on or before the January 25, 2000 deadline. Consequently, under the plain and unambiguous terms of the Agreement, he was bound to have any Claims decided by the NAF, or another recognized arbitration organization.

Although bound by the terms of the "Arbitration and Litigation" section of the Agreement, following the award issued by the NAF, Mr. Darocha could have contested that award in accordance with the procedures outlined in the Uniform Arbitration Act, *supra*. From the record, there is no indication that Mr. Darocha sought the trial court's review of the award within the ninety-day time frame set out in the statute.

In his brief, Mr. Darocha relies upon facts not material to the issue before this Court. He states that his "status as an individual within the definition of 50 USC Appendix, Section 2, as an 'enemy' of the United States, remains unrefuted." Furthermore, Mr. Darocha asserts that the amount of his property that is in the possession of the Treasurer of the United States is a material fact that has not been determined. While we concede that both of these statements, as well as other facts asserted in the brief, may be true (or in dispute), these facts are not material to the issue before this Court.

For the foregoing reasons, we affirm the Order of the trial court. Costs of this appeal are assessed against the Appellant, Michael J. Darocha, and his surety.

_____

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.